OBTAINING EVIDENCE FROM DIVERSE SOURCES AND NON-PARTIES IN AND OUT OF ONTARIO

by

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This paper addresses the new developments in the law relating to the obtaining of evidence outside Ontario, from non-parties and from other proceedings.

The law in this area is somewhat unknown, disparate and difficult. The common thread is the word "outside" as in "outside the box." It requires the advocate to reach outside the areas of the law of evidence with she or he may be most comfortable and familiar.

In this paper, we will explore three "outside" questions. First, outside Ontario. How can the evidence of witnesses located outside Ontario be obtained for use in a proceeding in Ontario? Second, outside the parties. How can discovery evidence from non-parties be obtained and used? Third, outside the action. How can evidence obtained in one proceeding be used in another proceeding?

First, how can evidence be obtained from persons outside Ontario for use in an Ontario proceeding? We will examine this question in the total context of obtaining before trial evidence from witnesses for use at trial.

1. Evidence *De Been Esse* and on Commission

Introduction

When it is likely that a witness will not be able to testify at a civil trial, counsel may wish to obtain the witness' evidence beforehand. [2] This can be done by way of an out-of-court examination pursuant to a consent of the parties or an order under Rule 36.01 of the *Rules of Civil Procedure*. [3] The examination is known as an examination *de bene esse*.

In addition, if the order is for the examination of a person outside Ontario then under Rule 36.03 the moving party is entitled to the issuance of a commission and letters rogatory. The

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[2] John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto & Vancouver: Butterworths Canada, 2009) at 39-40 [*Sopinka*]

[3] R.R.O. 1990, Regulation 194

examination will be conducted before the commissioner so appointed and is known as an examination on commission or commission evidence.

Both types of examination proceed by way of examination, cross-examination and re-examination along the lines of trial testimony,[4] except that any objections are dealt with at trial, as the ultimate admissibility of this evidence is left to the discretion of the trial judge.[5]

When Evidence *De Bene Esse* or on Commission is appropriate

In order to examine a witness under oath before trial for the purpose of tendering the witness' evidence at trial, Rule 36.01(1) and (2) impose two initial requirements: (1) the requesting party must obtain leave from the court or the consent of the other parties, and (2) the party must intend to introduce the evidence of this person at trial.[6]

Due to a change in the Rules that came into force on July 1, 2007,[7] parties that intend to commence a proceeding but have yet to do so may now seek leave to conduct examinations under Rule 36.01.[8]

When the other party does not consent to such examinations, Rule 36.01(3) states that the court should consider the following in exercising its discretion as to whether to grant leave:

(a) the convenience of the person whom the party seeks to examine;

(b) the possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness;

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[4] Rule 36.02

[5] Rule 36.01(4)

[6] In *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, [2000] O.J. No. 2420 (S.C.), the plaintiffs sought to examine a 79-year-old defendant before trial because his evidence was crucial to the trial. The Court refused this request because counsel for this defendant had already undertaken to call him as a witness. A party cannot examine a witness under 36.01 if it is not going to introduce that evidence at trial. Rule 53.07(4) states that once an undertaking is given by the adverse party's counsel to call that party as a witness at trial, the other party has no right to call that witness. Therefore, the plaintiff cannot pass the first step of 36.01, because it only applies to "a party who intends to introduce the evidence of a person at trial."; *Proietti v. Raisauda* (1992), 7 C.P.C. (3d) 11 (Ont. Gen. Div.); *White v. Weston (*1986), 14 C.P.C. (2d) 121 (Ont. H.C.). Presumably the transcript of the defendant's examination for discovery could be used under Rule 31.11 if the defendant died before trial or did not in fact testify.

[7] O. Reg. 8/07. Rule 36.0(1) was introduced which defined "party" in Rule 36.01 to include a party to a pending or intended proceeding.

[8] See *TD Insurance Home and Auto v. Sivakumar (Litigation guardian of)*, [2008] O.J. No. 5023 (C.A.), 2008 ONCA 835. The cause of an infant's brain injury was contested. The insurance company obtained three expert reports. The suit had not been commenced, but the limitation period did not begin to run until 2019, when child reaches 18. The insurance company wanted to examine and record three experts because they might not be alive in 2019. The court permitted the potential defendant to examine two of the experts, on the ground of *res judicata*. The Ontario Court of Appeal had heard the same case in 2006, and had refused the insurance company's request because the litigation had not commenced (see *TD Insurance Home and Auto v. Sivakumar* [2006] O.J. No. 2053, 80 O.R. (3d) 671). The new rule was enacted between the two hearings.

(c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;

(d) the expense of bringing the person to the trial;

(e) whether the witness ought to give evidence in person at the trial; and

(f) any other relevant consideration.[9]

In addition to these factors, there is an established common law test for permitting the taking of commission evidence. This test was recently articulated by Master Albert in *Wright v. Wasilewski*:[10]

> "the Court be satisfied that the application is bona fide, the issue is one which the Court ought to try, the witness have material evidence and there is a good reason why the witness cannot attend at trial [Mr. Justice Galligan, in *Union Carbide Canada Ltd. v. Vanderkop* (1975), 6 O.R. (2d) 448, adopting the test applied by the Master, who applied the test recited by Stewart J. in *Niewiadomski v. Langdon*, 6 D.L.R. (2d) 361, [1956] O.W.N. 762 at p. 765, who applied the test set down by Osler J.A. in *Ferguson v. Millican* (1905), 11 O.L.R. 35]."

Courts have had ample opportunity to consider granting leave for examinations on commission and *de bene esse*. A survey of these decisions appears below, using the framework of the considerations set out in Rule 36.01(3).

(a) The convenience of the person whom the party seeks to examine;

The issue of the convenience of the person whom the party seeks to examine[11] does not appear to be decisive factor in most cases, particularly if the witness is a party. However, it will form part of the court's consideration.[12]

(b) The possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness

When a witness is ill and not likely to live to trial, courts will usually allow for an examination to safeguard that witness' evidence.[13] As Henry J. said in *Patterson v. Christie et al.*, "The

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[9] Rule 36.01(3)
[10] [2001] O.J. No. 248, 52 O.R. (3d) 410 (S.C.) at para. 10.
[11] Rule 36.01(3)(a)
[12] See, for example, *Proietti v. Raisauda [*1992] O.J. No. 662, which downplays the significance of a defendant's convenience: "In regard to (2) (a) convenience of the person. This person is a defendant and it is within his realm to return or not return. I do not consider his convenience. He will obviously not be unavailable because of death, infirmity or sickness, so that does not arise."
[13] See, for example, *Attica Investments Inc. v. Gagnon (*1984), 47 C.P.C. 316, [1984] O.J. No. 2271 (Ont. Master), *Ostrom v. McKinnon* [1999] O.J. No. 4518 (S.C.), 46 C.P.C. (4th) 120, *Berry v. Pulley*, [2007] O.J. No. 1825 (S.C.); *Scott v. Canadian General Life Insurance Co*. [1988] O.J. No. 1229, in which the

fundamental issue [for granting an examination *de bene esse*] is whether the testimony of a witness ought to be taken now and so preserved in case the witness is unavailable through death or otherwise at the trial."[14] Some reasonable likelihood that the witness will not be available at trial will have to be shown and the mere possibility that the witness will not do so is likely to be insufficient.[15] In fact, courts may grant examinations on the basis of old age alone: A witness being 70 years of age or older is generally *prima facie* grounds for allowing an examination *de bene esse*.[16] When the medical rationale for out-of-court examination is contested, the court may order that the witness undergo a medical examination.[17]

Despite this policy in favour of preserving evidence, there is at least one scenario where such examination may not be possible. When a party has undertaken to call a witness at trial, adverse parties cannot obtain leave to examine that witness under Rule 36, because they are not the ones who will be calling the witness, as required by Rules 36.01(1).[18] As will be discussed below, if the witness is able to testify at the time of trial after having been examined under Rule 36, the court may allow counsel to call the witness to give *viva voce* evidence before the court.[19]

(c) The possibility that the person will be beyond the jurisdiction of the court at the time of the trial

This possibility is the one with which we are directly concerned in this "outside Ontario" analysis. Under Rule 36.01(2)(c), an order may be made to conduct examinations on commission where the persons to be examined will be outside the jurisdiction at the time of trial, and therefore cannot be compelled to attend at trial and are unwilling to enter the jurisdiction.[20] Courts have granted commissions when the person is unwilling to attend, *inter alia*, for fear of criminal prosecution,[21] or for medical and personal reasons.[22]

While each case must be examined on its merits, courts may refuse a request for examination under Rule 36.01 when the person in question was examined for discovery before leaving the jurisdiction.[23] In the case of party witnesses, the person's discovery transcript may instead be

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plaintiff was granted leave under Rule 36 to examine the plaintiff's 81-year-old father, who had Parkinson's disease.

[14] [1983] O.J. No. 2965, 41 O.R. (2d) 145 at para. 10.

[15] *Ostrom v. McKinnon* (1999), 46 C.P.C. (4th) 120 (Ont. S.C.J.).

[16] *Wright v. Whiteside* (1983), 40 O.R. (2d) 732, [1983] O.J. No. 2504 (Ont. H.C.J.), *White v. Weston (*1986), 14 C.P.C. (2d) 121, [1986] O.J. No. 2611 (Ont. H.C.J.). See also *Attica Investment Inc. (c.o.b. Fairbank Carpentry Co.) v. Gagnon (c.o.b. Bookkeeping Services)* [1984] O.J. No. 2271, 47 C.P.C. 316 (Ont. Master) in which a defendant was granted leave to examine a co-defendant

[17] *Botiuk v. Toronto Free Press Publications Ltd. et al.*, [1986] O.J. No. 2953, 56 O.R. (2d) 184 (Master)

[18] *Aviaco International Leasing Inc. v. Boeing Canada Inc*., *supra*.

[19] *Russett v. Bujold* [2003] O.J. No. 5532 (S.C.)

[20] See, for example, *Apotex Inc. v. Global Drug Ltd* [1998] O.J. No. 694 (Master)

[21] *Union Carbide Canada Ltd. v. Vanderkop* (1974), 6 O.R. (2d) 448, [1974] O.J. No. 2190 (Ont. H.C.J.)

[22] *Simpson v. Vanderheiden; Phoenix Assurance Co. of Canada, Third Party Simpson v. Phoenix Assurance Co. of Canada,* [1985] O.J. No. 2426, 49 O.R. (2d) 347 (Ont. H.C.J.)

[23] *Proietti v. Raisauda,* [1992] O.J. No. 662 (O.C.J. Gen Div.). Other factors made this application less sympathetic, including the impending trial date, and the fact that the plaintiff had not offered to pay the travel costs of the defendant it sought to examine, who had moved to the Netherlands.

read into evidence under Rule 31.11(1). An order has also been refused because the witness was only corroborative of the moving party's evidence.[24]

We can look for guidance about how this rule ought to be applied by looking to the decisions dealing with the use of a non-party's discovery examination at trial under Rule 31.11(6). In this situation the court may look to Rule 36.01 to determine whether granting such leave is appropriate. In one such case, the court found that the fact that two favourable witnesses did not wish to travel from Alberta to Ontario during the winter was insufficient to allow their testimony to be read in under Rule 31.11(6).[25] This case highlights the scrutiny that a court may undertake with respect to the witness' reason for not wanting to attend trial. While the factors relating to taking of the evidence at the front end are not identical to those relating to its use at the back end, the same sort of logic may be applied to the issue of whether the order for commission evidence ought to be granted in the first place.

The question of expense usually arises in conjunction with a witness residing outside of the jurisdiction. Courts have repeatedly granted leave for examination on commission when the cost of bringing the person to trial is prohibitive for the party seeking leave.[26] The party seeking to take evidence under Rule 36.01 may be ordered to pay in advance any or all the costs that other parties can reasonably be expected to incur from the resulting examination.[27]

In deciding whether an order for commission evidence of a witness in another province of Canada ought to be granted, the court might consider sections 4 and 5 of the *Evidence Act.* Under those sections, interprovincial subpoenas may be issued by an Ontario Court and served upon a witness anywhere in Canada.[28] However, there has been little judicial consideration of those sections. There has been no judicial guidance about how they can be enforced against a person in another province and beyond the jurisdiction of the Ontario court. Nor is there any judicial consideration of whether a moving party is entitled to an order for commission evidence when, under these sections, the witness can apparently be required to attend the trial in Ontario.

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[24] *Maynard v. Maynard,* [1947] O.W.N. 493

[25] *Isildar v. Kanata Diving Supply, a division of Rideau Diving Supply Ltd*. [2008] O.J. No 2405 (S.C.). In this case, the defendant submitted minimal evidence as to why the witness could not come to Ontario to testify other than the fact that it was winter and the discovery had occurred 2.5 years previous, in which time the litigation had developed.

[26] *Niewiadomski v. Langdon (*1956), 6 D.L.R. (2d) 361, [1956] C.C.S. No. 726 (Ont. H.C.J.), *Mamarbachi v. CockShutt Plow Co*., [1953] O.W.N. 44, [1953] C.C.S. No 876 (Ont. Master), aff'd [1953] O.W.N. 44 at 52 (Ont. H.C.J.), *Robins v. Empire Printing and Publishing Co*. (1892), 14 P.R. 488, at 496, [1892] O.J. No. 257 at paras. 30-36 (Ont. H.C.J.)

[27] Rule 36.01(5). See also *Somers (Litigation guardian of) v. Berger* [2009] O.J. No. 1656 (S.C.). The defendant was very ill and could only be examined for 30 minutes per day due to health concerns. The defendant was ordered to pay the plaintiff's cost of travel, cross-examination, hotel, and food.

[28] *Evidence Act*, R.S.O. 1990 (c) E.23. As the text of this statute notes, these sections were enacted by the provinces of Canada in 1854 and have been carried into the revised statutes of Ontario.

(d) Whether the witness ought to give evidence in person at the trial

There is a general preference that all witnesses give their evidence in person at trial, especially those who have crucial evidence. However, when faced with the choice between having no evidence and commission evidence or evidence *de bene esse*, the courts are likely to choose the latter, provided that "the application is bona fide, the issue is one which the Court ought to try, the witness have material evidence and there is a good reason why the witness cannot attend at trial."[29]

The importance of the person's evidence to the case is considered under this heading. In some cases, the court considers that the importance of the witness' evidence weighs against the motion being granted (or the evidence if taken out of court being read in at trial);[30] while in others, the importance of the witness's evidence weighs in favour of the examination being held out of court.[31]

Sometimes this issue is put somewhat differently, namely, whether the evidence is controversial. In some cases, this factor will not be a sufficient reason to deny the motion, but in other cases, the motion to take a person's evidence out of court has been denied on the ground that it would preclude effective cross-examination.[32] These issues may be overcome if the examination is videotaped so that the trial judge has a greater appreciation of the witness' testimony.[33] In addition, the court may refuse an application if it is not clear what the witness' evidence will be because he or she has not been examined for discovery.[34]

The witness' reasons for not attending trial are also considered under this criterion. In this regard, there is a heavy burden on the party applying to examine the witness out of court to demonstrate why these are sufficient reasons.[35]

(e) Any other relevant consideration.

Courts have used this residual category in various ways. At the broadest level, this can include "whether the evidence to be given will be possibly relevant to issues in the litigation".[36] Where

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[29] *Wright v. Wasilewski, supra* at note 8. See also *Union Carbide Canada Ltd. v. Vanderkop (*1974), 6 O.R. (2d) 448, [1974] O.J. No. 2190 (Ont. H.C.J.)

[30] *Isildar v. Kanata Diving Supply, a division of Rideau Diving Supply Ltd.* [2008] O.J. No 2405 (S.C.) at para. 14.

[31] *Midland Resources v. Shtaif*, 2009 CanLII 67669 (ONSC).

[32] *Singer v. Singer* (1983) 38 (C.P.C.) 63 (Ont. Master); *Copps v. Time Int. of Can. Ltd.*, [1964] 1 O.R. 229 (Master); *Dodd v. Charlton Transport Ltd.* [1956] O.W.N. 230 (H.C.); *Guiry v. Wheeler*, [1954] O.W.N. 381 (Master).

[33] *Wright v. Whiteside* (1983), 40 O.R. (2d) 732 (H.C.); *Simpson v. Vanderheiden; Simpson v. Phoenix Assurance Co. of Canada* (1985), 49 O.R. (2d) 347 H.C.

[34] *G.C. Rentals and Enterprises Ltd. v. Giamnarino [*1986] O.J. No. 3026 (H.C.J.)

[35] *Murray v. Plummer (*1913), 4 W.W.R. 717, at 720, 11 D.L.R. 764, [1913] S.J No. 28 (Sask. S.C.). In this case, the court denies an application by a defendant for an examination on commission of a co-defendant residing in Portland, Oregon, due to insufficient evidence as to why the co-defendant could not attend. The court knew the company that the witness worked for, but did not know his specific occupation, or whether he would be able to attend Saskatchewan at a relatively small cost given his job.

[36] *Apotex Inc. v. Global Drug Ltd* [1998] O.J. No. 694 (Master) at para. 2.

the evidence sought serves only to corroborate the applicant's own evidence, the commission may be dismissed.[37] More often, however, this category includes issues specific to an application that are not covered by the other categories.

If a witness has already been examined under Rule 36.01, an application for an additional out-of-court examination may depend on whether the issues of the case were sufficiently developed at the time of the previous examination. If new information comes to light through discovery, courts may allow a party to conduct a second examination to put that new information to the witness.[38] If the person has already been examined for discovery, the subsequent development of the litigation will also affect a court's decision on whether to allow an application under Rule 36.01, as opposed to allowing the discovery evidence to be read in at trial.[39] In addition, the same sort of factors may determine whether a particular expert's evidence should be taken under Rule 36, or whether another competent expert is available to testify at trial instead.[40]

Use at Trial

The use at trial of evidence taken under Rule 36.01 is governed by Rule 36.04. The major factor under Rule 36.04 is whether the examinee is a party or not.[41]

Relying at trial on the examination under Rule 36.01 of a party may only be done with leave of the trial judge.[42] As Power J. said in *Russett v. Bujold*: "The general rule therefore appears to be that a party, *prima facie*, should be compelled to testify at the trial if possible. Witnesses who are not parties are treated differently."[43]

When considering whether to allow the transcript and videotape evidence of a party to be used at trial instead of *viva voce* evidence, the trial judge must take into account (a) whether the party is unavailable to testify by reason of death, infirmity or sickness, (b) whether the party ought to give evidence in person at the trial; and (c) any other relevant consideration.[44] Concerns of prejudice from allowing the party witness who has provided evidence under Rule 36.01 to provide *viva voce* evidence at trial does not generally overtake the interest in having parties testify in court.[45]

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[37] *Maynard v. Maynard*, [1947] O.W.N. 493 (Master)
[38] *Berry v. Pulley*, [2007] O.J. No. 1825 (S.C.) at paras. 38-46. In this case,
[39] *Isildar v. Kanata Diving Supply, a division of Rideau Diving Supply Ltd.* [2008] O.J. No 2405 (S.C.). In this case, the witness had been examined for discovery 2.5 years prior, before the expert reports were delivered.
[40] *TD Insurance Home and Auto v. Sivakumar (Litigation guardian of)*, [2008] O.J. No. 5023 (C.A.), 2008 ONCA 835. Considering an application to examine three experts under Rule 36.01, the court held that the two experts who had studied the car involved in a crash should be examined because the car would likely not be available to examine at the time of trial. The court refused to grant a commission for a third expert who had simply looked at medical records, because the records would be available at the time of trial, and another expert could testify regarding the records if the original one was not available.
[41] See Rule 36.04(1) for the definition of "party" for the purposes of this section.
[42] Rule 36.04(4)
[43] [2003] O.J. No. 5532 (S.C.) at para. 18.
[44] Rule 36.04(5)
[45] *Russett v. Bujold, supra*.

For non-party witnesses, the presumption is reversed. Unless the trial judge grants leave for the witness to testify at trial, non-party witnesses are not permitted to testify a trial if they have been examined under Rule 36.01.[46] At trial, any party may use the transcripts and videotape of these non-party witnesses unless the court finds a reason why the witness ought to appear at trial instead.[47]

Let us then turn to the second "outside" issue, and that is the obtaining of discovery evidence of non-parties, or production of documents from non-parties.

2. Evidence for Discovery of a Non-Party Witness

Under Rule 31.10, the court may allow the examination for discovery of a non-party if the witness has information relevant to the matters in issue in the action, other than an expert. In order to obtain an order, the moving party must satisfy the court that it has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine; and that it would be unfair to require the moving party to proceed to trial without having the opportunity to examine the witness; and that the examination will not cause undue delay, expense or unfairness.

There seems to be some controversy as to what the word "or" in Rule 31.10(2)(a) means: Does it mean that the moving party cannot obtain the information from either the opposing party or the proposed witness, does it mean that the moving party cannot obtain that information from the opposing party and the witnesses it wishes to examine?

Some cases have held that if the moving party cannot obtain the information from the opposing party, that suffices and the moving party does not need to show that it cannot obtain the information from the proposed witness.[48] Other cases hold that unless the moving party cannot obtain the information from the proposed witness, an order will not be made.[49] In another case, even though the responding party agreed to obtain the information from the non-party witness, an order under Rule 31.10 was made.[50]

Rule 31.10 does not, by itself, permit the examination of the non-party to be used at trial by being read in by the moving party. Rule 31.10(5) states that the evidence taken under this rule cannot be read into evidence at trial under Rule 31.11(1). However, the examination for

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[46] Rule 36.04(3)

[47] Rule 36.04(2). For a judicial consideration of the civil regime and the rationale for the amendments that created the current model, see *White v. Weston* (1986), 14 C.P.C. (2d) 121 (Ont. H.C.).

[48] *Buzzi v. Berger* (1998), 20 C.P.C. (4th) 360 (Ont. Gen. Div.); *Famous Players Development Corp. v. Central Capital Corp.* (1991), 6 O.R. (3d) 765 (Div. Ct.); *Cameron v. Louden* (1998), 21 C.P.C. (4th) 244 (Ont. Master).

[49] *Rothwell v. Raes* (1986), 13 O.A.C. 60 (Div. Ct.); *Carleton Condo Corp. No. 25 v. Schenkman Corp.* (1986), 9 C.P.C. (2d) 233 (Ont. Master); *Microtel Ltd. v. Endless Electronics Distributors Inc.* (1988), 32 C.P.C. (2d) 85 (Ont. H.C.).

[50] *Dalewood Investments Ltd. v. Canada Trustco* (1986), 9 C.P.C. (2d) 129, 131 (Ont. H.C.; Div. Ct.)

discovery of the non-party can be used to impeach the witness if that person is called to testify at trial.[51]

While Rule 31.10(5) says that the evidence of the non-party cannot be read into trial under Rule 31.11(1), no mention is made of Rule 31.11(6). This latter rule permits a party to read into evidence all or part of the evidence "of a person examined for discovery", if the person examined for discovery has died, is unable to testify because of illness or infirmity, or for any other reason cannot be compelled to attend at trial.

This sub-rule does not state that it applies to "a party" examined for discovery, but rather to a "person" examined for discovery. Accordingly, this sub-rule is not apparently limited to the examination for discovery of a party, and indeed cannot be read as so limited since the prior sub-rule, Rule 31.11(5) expressly refers to the examination for discovery of a party. Accordingly, Rule 31.11(6) provides a means whereby the examination for discovery of a non-party may be read into evidence by any party at trial if the circumstances set forth in sub-rule exist at trial.

3. Production from a Non-Party

Under Rule 30.10(1) the court may order that a non-party produce for inspection a document that is in the possession, control or power of a non-party. Such an order may be obtained if the court is satisfied that the document is relevant to a material issue and it would be unfair to require the moving party to proceed to trial without having discovery of the documents. The court may order that a certified copy of the document be prepared.

The moving party is required to specify the types of documents sought to be produced and to identify particular documents believed to be in the possession of the non-party.[52] Production of employment records,[53] hospital and medical records,[54] insurance files,[55] and orders have been granted against various other non-parties.

Under this rule, a *Norwich* order may be granted *ex parte* for the production of documents by third parties for the purpose of identifying wrongdoers, to identify a claim against a wrongdoer or trace and preserve assets.[56]

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[51] Rule 31.11(2).
[52] *Herrington v. Voss*, [1968] 1 O.R. 250 (Master); *Halpin v. Gillam*, [1967] 2 O.R. 269 (Master).
[53] *Pryslac v. Anderson* (1987), 57 O.R. (2d) 788 (H.C.). However, production of employment records has been refused in other cases, particularly if the opposing party undertook to produce such records; *Wright v. Clark* (1984), 48 O.R. (2d) 528 (Master).
[54] *A.(A.) v. Security National Insurance Co.* (2008), 58 C.P.C. (6th) 147 (Master). Numerous decisions dealing with hospital and medical records have been decided under this rule.
[55] *Anger v. Dykstra* (1984), 45 O.R. (2d) 701 H.C. Production was refused when the policy was not relevant to a material issue in the action: *Belmont (Village) v. Joe Snyders Construction Ltd.* (1989), 44 C.P.C. (2d) 292 (Div. Ct.).
[56] *Isofoton S.A. v. Toronto-Dominion Bank* (2007), 85 O.R. (3d) 780 (S.C.J.); *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481; 79 C.P.C. (6th) 201 (C.A.); *Ontario (Attorney General) v. Two Financial Institutions* (2010) 98 O.R. (3d) 775 (S.C.J.)

Let us then turn to the third issue, and that is the use of evidence "outside the action', namely evidence given in other proceedings.

We will first examine how the evidence from other proceedings may be introduced into evidence in the present proceeding. Then we will consider whether the implied or deemed undertaking rules will prohibit the use of that evidence in the present proceeding.

4. Proof and Use of Transcripts from Other Proceedings[57]

Proving Examination Transcripts from Other Proceedings

There are two main reasons why a civil litigant may want to introduce in one proceeding the transcript of an examination from another proceeding: (i) to attack the credibility of a witness using prior inconsistent statements and (ii) to rely on the transcript for the truth of its contents.

For purposes of impeachment, prior inconsistent statements contained in an examination for discovery or trial evidence can simply be put to the witness. If the witness does not admit that he or she made the statement, then proof may be given that he or she did in fact make the statement, presumably by calling the court reporter as a witness. Before seeking to prove the statement, counsel must put to the witness the circumstances under which the statement was made and ask the witness whether he or she did, in fact, make the statement. [58]

Where statements in a transcript are material, the transcript is likely to be admitted for the limited purposes of impeachment without going to great lengths in order to authenticate the document. While a court may require the party seeking to impeach the witness to call the court reporter who recorded the evidence to testify as to the accuracy of the document, this step should not be necessary if the transcript has been certified in accordance with the *Evidence Act* of Ontario (*OEA*) or pursuant to a regulation or rule of court.[59]

If the examiner is seeking to rely on the transcript for the truth of its contents, however, the transcript will not suffice unless the witness adopts the statements contained therein. Where a witness refuses to adopt the prior testimony, the transcript will only be admissible if the

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[57] This section has been largely drawn from Thomas G. Heintzman, Keegan Boyd and Nain Sahni, "The Use of Evidence Given in One Proceeding In Other Proceedings" (Prepared for Symposium: Evidence Law for the Civil Litigator — 5th Annual Conference, 2008) and updated to reflect recent developments.

[58] See *Evidence Act*, R.S.O. 1990, Ch. E.23, s. 5 *[OEA]*; *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 11 *[CEA]*.

[59] *OEA*, *ibid*., s. 5. Note: *OEA*, s. 4 provides: "Where an oath, affirmation or declaration is directed to be made before a person, he or she has power and authority administer it and to certify to its having been made." *OEA*, s. 5(2) provides that "… a transcript … that has … been certified in accordance with the Act, regulation or rule of court, if any applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript." Thus, it appears to be the case that a transcript that has been certified by a stenographer or other individual will not require *viva voce* authentication.

transcript falls within an established exception to the rule against hearsay or if the transcript meets the threshold required to be admitted under the principled approach to hearsay evidence.

While final judgments of tribunals and courts may arguably amount to public or official documents, and as such be admissible under the statutory or common law public/official documents exceptions to the rule against hearsay, an examination transcript may not be considered a 'public document' or 'judicial record.'[60]

The Admissions Exception

One established exception that would seem to warrant admissibility of a transcript for the truth of its contents is the 'admissions' exception, which provides that statements made by a party against their interests can be entered into evidence as an exception to the rule against hearsay. While admissions against interests made in any context will satisfy this rule, case law supports the proposition that a party's examination for discovery is admissible as an admission by the party on proof that the examination was correctly recorded.[61] It is important to note, however, that these cases were decided prior to significant developments in the law with respect to the deemed/implied undertaking and the authentication of evidence.[62]

The Principled Approach

A significant development in the law regarding prior inconsistent statements has expanded the use of those statements beyond purposes of impeachment where the admissibility of the statements is necessary and there are sufficient indicia of reliability. The current state of the law should permit the prior inconsistent statement of be admitted for the truth of its contents if a witness persists in adhering to a subsequent statement and if the necessity/reliability threshold is satisfied. The trier of fact would then consider both statements for the truth of their contents and the inquiry would become one of weight and credibility. This development in the criminal law field may have significance in civil trials if the witness denies that the prior evidence was true. [63]

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[60] In *R. v. P. (A.)* (1996), 109 C.C.C. (3d) 385 (Ont. C.A.), Laskin J.A. articulated four criteria for the admissibility of a public document or a judicial record, the fourth of which requires that the document be available for public inspection. Despite a relatively wide interpretation of the word duty in subsequent case law, transcripts of examinations, and particularly examinations for discovery, may not be intended to be available for public inspection.

[61] *Ray v. Port Arthur, Duluth, and Western R.W. Co.* (1903), 2 O.W.R. 345 (C.A.); *New Augarita Porcupine Mines Limited v. Gray*, [1953] O.W.N. 24 (H.C.J.). See also *Cooperative Fire and Casualty Company v. Beaulieu* (1977), 21 A.P.R. 623 (N.B.Q.B.), where Richard J. permitted the plaintiff to introduce the defendant's admission on an examination for discovery in a previous action that he did not remember the accident in question. Richard J. commented that: "Evidence given under oath is presumed to be the truth, and should not vary where it is given on one of several aspects of a dispute."

[62] *Viva voce* proof of the transcript should no longer be required given simplified procedures for the authentication of transcripts under the *OEA*.

[63] *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.) [*B. (K.G.)*]. This is an extension of the Supreme Court's adoption of the principled approach to hearsay evidence. See *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Starr*, [2000] 2 S.C.R. 144; *R. v. Khelawon*, [2006] 2 S.C.R. 787.

The necessity criterion is not likely to be a barrier to admissibility in most cases. The Supreme Court has noted:

> … The assertion may be such that we cannot expect, again, or at this time, to get evidence of the same value from the same or other sources … The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience can be predicated. But the principle is the same. The requirement of necessity has been met.[64]

In considering the admissibility of the transcript of a guilty plea, Weiler J.A. of the Ontario Court of Appeal reasoned that the inconvenience of requiring a public official to attend in court to prove the *public* document "makes it necessary to admit the transcript."[65] The necessity threshold is not a high one and would appear to be satisfied in most cases calling for the admission of transcripts from an examination.

The reliability threshold required to admit the prior transcript of an examination will be high in situations where the examinee is not dead or otherwise unavailable. The court is concerned with overcoming the "hearsay dangers" of prior inconsistent statements, which generally speaking include (i) that the prior statement was not taken under oath, (ii) that there was not an opportunity for the trier of fact to observe the demeanour of the witness, and (iii) that the statement was not subject to cross-examination.[66]

Issues (i) and (iii) are not of concern with respect to transcripts from examinations for discovery in prior proceedings. As to issue (ii), the courts have found that a videotape[67] and audiotape[68] of prior statements may provide a sufficient substitute for the opportunity to observe the demeanour of the witness in court.

Where Examinee is Unavailable

If the examinee has died or is otherwise unavailable and a party seeks to rely on the examinee's discovery transcript from a prior proceeding, a court will likely consider similar factors to those set out in Rule 31.11 in making a determination regarding admissibility.

As noted above, Rule 31.11(6) provides that where a person examined for discovery has died or is otherwise unavailable to testify, the court may grant leave to read into evidence all or part of the evidence given on the examination for discovery in that proceeding as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in court. In deciding whether to exercise its discretion, the court is to consider (a) the extent to which the person was cross-examined on the examination for discovery; (b) the importance of the evidence

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[64] *R. v. C. (W.B.)* (2000), 130 O.A.C. 1 at para. 36 citing *R. v. Smith*, [1992] 2 S.C.R. 915.
[65] *Ibid*. at para. 31.
[66] *B. (K.G.), supra*.
[67] *Ibid*. and *R. v. Lee* (1996), 7 O.T.C. 222 (Gen. Div.). But see also *R. v. Moneyas* (1995), 194 A.R. 1 (Prov. Ct.).
[68] *R. v. Bentley* (1994), 31 C.R. (4th) 393 (B.C. Prov. Ct.); *R. v. Harvey* (1996), 109 C.C.C. (3d) 108 (B.C.C.A.).

in the proceeding; (c) the general principle that evidence should be presented orally in court; and (d) any other relevant factor.[69]

Rule 31.11 provides a principled approach to the admission of discovery evidence when the witness is unavailable to testify. Although that approach is designed for the use of discovery evidence in the *same* proceeding, the courts may have regard to the same principles when considering the admission of discovery evidence, or evidence taken in open court, from *another* proceeding, on the ground that the public policy and evidentiary principles are the same.

Restrictions on Use of Evidence from Regulatory Proceedings

In determining whether or not evidence from a regulatory proceeding may be used in subsequent civil or criminal proceedings, it is important to consider the regulatory body's enabling legislation, the *Statutory Powers Procedure Act*,[70] and the provisions of the *Charter*, the *Canada Evidence Act (CEA),* and the *OEA*.

Legislative Restrictions

Occasionally, the legislative scheme of a self-regulated profession will contain an express confidentiality provision that limits the subsequent use of documents or examination transcripts produced during a regulatory proceeding.[71] However, the provision may not clearly state whether or not materials produced in the regulatory proceedings are protected from disclosure in a litigant's affidavit of documents in a civil action.[72] The courts have held that it would defeat the confidentiality purpose of a statute if materials that would clearly be inadmissible at trial, by virtue of the use prohibition in that statute, had to be disclosed in a civil proceeding.[73]

The *Statutory Powers Procedure Act*

More often than not the legislative schemes of self-regulated professions are silent on the issue of the subsequent use of evidence.[74] In cases where the *SPPA* applies, witnesses in regulatory

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[69] *Ibid*., Rule 31.11(7).
[70] R.S.O. 1990, c. S.22, s. 14 (1); 1994, c. 27, s. 56 (28) [*SPPA*].
[71] See, *e.g*., *Regulated Health Professions Act*, S.O. 1991, c. 18, s. 36(3), which states: "No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*. 1991, c. 18, s. 36 (3); 1996, c. 1, Sched. G, s. 27 (2) [emphasis added]. See, *e.g.*, *Ontario v. Lipsitz* [2011] O.J. No. 2820 (C.A.) See also *Ontario College of Teachers Act*, 1996, S.O. 1996, c. 12, s. 48.
[72] Morrison, *supra*.
[73] *Ibid*. See, *e.g*., *Hopps-King Estate v. Miller* (1998), 29 C.P.C. (4th) 23 (Ont. Master).
[74] See, *e.g*., *Law Society Act*, R.S.O. 1990, c. L.8; *Architects Act*, R.S.O. 1990, c. A.26; *Professional Engineers Act*, R.S.O. 1990, c. P.28; *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19. Note, however, that the *Law Society Act* prohibits disclosure by benchers, officers, employees, agents and representatives of the Law Society of Upper Canada, and the other self-regulatory regimes noted all

proceedings are protected in the sense that any answers given at a hearing may not be used in any trial or other proceeding against them, other than a prosecution for perjury.[75] In cases where the *SPPA* does not apply and there is no restriction in the enabling legislation of the regulatory body, regard must be had to the relevant provisions of the *Charter*, the *Canada Evidence Act*, and the *OEA* to determine what use, if any, may be made of evidence from regulatory proceedings in subsequent criminal and/or civil proceedings. The applicability of these provisions depends partly on the involuntary nature of the testimony.

Statutorily-Compelled Testimony in Canada

While section 11 of the *Charter* protects individuals from being forced to testify against themselves in trials where they stand accused, some regulatory bodies in Canada are given broad investigative powers that enable them to compel the production of documents or the giving of testimony under oath.[76] An issue that has arisen is the question of whether persons may refuse to answer questions on the grounds that criminal or quasi-criminal investigations or proceedings are sufficiently imminent for the protection against incrimination to be invoked.

Generally speaking, statutory authorities can only compel testimony for investigative purposes and not to further a prosecution under a regulatory regime. The line at which an investigation becomes prosecutorial may not be clear, but the issue is nevertheless crucially important to the person who is being forced to testify, both in the context of the proceedings at hand and with respect to the potential use of compelled testimony in parallel or subsequent proceedings.

Canadian constitutional law recognizes that at some point in the investigation before charges have been laid, the regulator in effect "crosses the Rubicon" and becomes the adversary. At this point, the investigation is over and the prosecution has begun so the individual can no longer be compelled to testify. However, there is no clear formula that can answer the question of whether or not the boundary has been crossed; rather, the court must look at all relevant factors on a case-by-case basis.[77]

Use in Criminal Proceedings

Statutorily-compelled testimony cannot be used against an examinee who is an accused in criminal proceedings. Compelling testimony in cases where there is a risk that such information

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contain a prohibition on disclosure by persons engaged in the administration of the relevant Act. See Morrison, *supra* at 10.

[75] *Supra*, s. 14(1).

[76] See, *e.g.*, ss. 11-17 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, which provide the staff of the Ontario Securities Commission (OSC) with the power to require the attendance of persons and compel them to testify under oath as if they were appearing in court.

[77] *R. v. Jarvis*, [2002] 3 S.C.R. 757 [*Jarvis*]; *Kligman v. Canada (Minister of National Revenue – M.N.R.)*, [2003] 3 F.C.R. 569; [2004] 4 F.C.R. 477 (C.A.) [*Kligman*]. See also Thomas G. Heintzman, O.C., Q.C. and Sarah Shody, "Cross-Border Securities Regulation: Self-Incrimination and the Convenient Forum" (Paper presented to the Canadian Institute Securities Litigation Conference, November 28, 2007).

may be used against the accused in a subsequent criminal proceeding treads dangerously close to violating the accused's *Charter* rights:[78]

- Section 13 of the *Charter* does not enable a witness to refuse to answer questions, but it does provide subsequent use immunity with respect to incriminatory proceedings, such as those with a risk of penal liability;
- Section 11(c) of the *Charter* entitles the accused not to be compelled as a witness against themselves in proceedings where they are charged with an offence; and
- Section 7 of the *Charter* has been interpreted to provide an accused with the right to remain silent and the right to preclude the use of any evidence found as a result of compelled testimony.

The constitutional regime in Canada is such that persons may be compelled to provide "full and frank" disclosure, but only in exchange for the guarantee that any incriminating evidence will not be used against them, except in a prosecution for perjury or for the giving of contradicting evidence.[79] This constitutional bargain adopts the relevant provisions of the Canadian and provincial Evidence Acts and enables statutory bodies to balance the State's need to obtain information for the benefit of the public against the individual's right not to be forced to incriminate herself.[80]

While in subsequent criminal proceedings, statutorily-compelled statements have been found to be inadmissible because they violate section 7 of the *Charter*, the constitutional protections against self-incrimination do not apply where a witness is testifying voluntarily. While a witness does not need to formally object to all questions in order to receive protection against subsequent use, the protection is not granted where a witness has voluntarily chosen to testify.[81] For example, if a witness voluntarily testifies at his own criminal trial, this voluntary testimony can be used against him in subsequent proceedings because it was not compelled.[82]

Use in Civil and Regulatory Proceedings

The section 13 *Charter* protection against self-incrimination does not apply to proceedings other than those where the witness is subject to criminal prosecution or analogous penalty.[83] Section 5(2) of the *CEA* apparently provides protection only against compelled answers being used in later criminal proceedings even though the section requires the witness to answer even if doing so might tend to establish his liability in a civil proceeding.[84] However, section 9(2) of the

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[78] See *British Columbia (Securities Commission) v. Branch* (1995), 123 D.L.R. (4th) 462 at para. 2 (S.C.C.) [*Branch*]; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 [*S. (R.J.)*].
[79] *R. v. Noel*, 2002 S.C.C. 67 at para. 21 [*Noel*]. See also, *R. v. Nedelcu*, [2011] O.J. No. 795 (C.A.), leave to appeal granted, [2011] S.C.C.A. No. 194.
[80] See *OEA*, *supra* note 2, s. 9; *CEA*, *supra* note 2, s. 5.
[81] In *R. v. Henry*, 2005 S.C.C. 76, the Supreme Court effectively limited the protection of section 13 of the *Charter* to those compelled to testify.
[82] *Ibid*.
[83] Alan W. Bryant , Sidney N. Lederman & Michelle K. Fuerst. *Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3d ed*. (Markham, ON: LexisNexis Canada, June 1999) at 515 [*Sopinka*]
[84] See *CEA*, R.S.C. 1985, c. C-5, s. 5(2).

OEA clearly states that compelled testimony cannot be used against the examinee in civil proceedings.[85]

In administrative or regulatory proceedings, the section 13 *Charter* protection only applies if the proceedings expose the individual to penal or quasi-penal consequences, such as imprisonment or a fine that is imposed to redress a wrong to society, not just to ensure compliance in a regulated field of activity.[86] In regulatory prosecutions, statutorily required reports submitted by the accused may be admissible even though they are compelled statements that may incriminate the accused.[87] Even the compelled production of non-statutorily required documents has been found to comply with section 7 of the *Charter* in the regulatory context.[88] In a regulated profession or industry, the regulator will argue that a more flexible approach should be taken as participants are aware and accept justified state intrusions into business dealings and records, while the accused will rely on the peril to which he is exposed as invoking the protection against self-incrimination.[89]

Having reviewed the general rules relating to the use of evidence from one proceeding in another, we will now review the main prohibitions against that use so far as examinations for discovery are concerned: the deemed and implied undertaking rules.

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[85] The protection under section 9(2) of the *OEA* may be available in regulatory proceedings, and not merely in court proceedings since, by section 2, the *OEA* applies to all "matters whatsoever respecting which the Legislature has jurisdiction."

[86] *Sopinka, supra* at 515. In *Donald v. Law Society (British Columbia)* (1983), 48 B.C.L.R. 210 (C.A.), the lawyer at a disciplinary hearing was afforded self-incrimination protection under s. 13 and documents with previously compelled statements could not be admitted since he faced heavy fines and possible disbarment. However, in *Knutson v Saskatchewan Registered Nurses Assn.*, [1991] 2 W.W.R. 327 (Sask. C.A.), the court held that s. 13 was not engaged and previously compelled criminal testimony could be used in a disciplinary hearing as there was no possibility of fine or imprisonment.

[87] In *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, the Supreme Court held that fishing logs and reports that must be submitted in order to participate in a regulated industry did not violate s. 7 and thus were admissible in evidence in subsequent regulatory proceedings against the accused. Speaking for a unanimous court, LaForest J. found that the admission of this type of statutorily-compelled information did not violate the principle against self-incrimination. None of the purposes and concerns underlying the principles against self-incrimination was engaged in the regulatory context. In particular, there was no: (i) real coercion by the state in obtaining the statements; (ii) adversarial relationship between the accused and the state when the statements were obtained; (iii) risk of an unreliable confession because of the statutory compulsion; or (iv) no risk of abuse of state power in this context.

[88] In *Branch*, s*upra*, Sopinka J. writing for the majority distinguished the self-incrimination protection necessary in the criminal versus the regulatory context.

[89] *Branch, supra* at paras. 39, 40, 82; *Mr. A. v. Ontario (Securities Commission)* (2006), 141 C.R.R. (2d) 79 para. 32 (Ont. S.C.J.) [*Mr. A. v. Ontario (Securities Commission)*].

5. Using Discovery Evidence from another Action: The Deemed Undertaking Rule[90]

Rule 30.1.01 requires that the parties and counsel undertake not to use evidence or information obtained through the discovery process for any purposes other than those of the proceeding in which the evidence was obtained.

This 'deemed undertaking' largely codifies the 'implied undertaking' of confidentiality that had developed at common law to balance the public interest in getting at the truth in a civil action against the privacy interests of parties and examinees in civil litigation.[91] Despite this codification, the implied undertaking may have residual application in Ontario in proceedings not governed by the *Rules*.

While the deemed and implied undertakings apply in different situations in Ontario, the former descends directly from the later, and therefore the jurisprudence on the undertakings' fundamental rationales is essentially the same. Thus, the leading decision of the Supreme Court of Canada in *Juman v. Doucette* deals with the implied undertaking in British Columbia. That province has no statute or rule-based deemed undertaking, and instead operates entirely upon the implied undertaking.[92] Nevertheless, that decision is very relevant to determine the operation of the deemed undertaking rule in Ontario.

In either case the undertaking seeks to protect the privacy interests of the disclosing party, usually in civil litigation, and to thereby encourage the promotion of "full and frank disclosure."[93] In *Juman v. Doucette*, the Supreme Court noted that the public interest in finding the truth in a civil action outweighed the privacy interest of the examined party protected by the implied undertaking, although the examinee's privacy still merited protection.[94] The law therefore requires that the invasion of privacy be limited to the level of disclosure necessary to achieve the right result in the civil action at hand.

There is no apparent difference in the court's discretion in granting relief from either the deemed or the implied undertaking. Rule 30.1.01(8) states that a court can order that the deemed undertaking does not apply to evidence or information obtained from evidence "if the interest of

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[90] This section is largely based on the paper by Thomas G. Heintzman, Keegan Boyd and Nain Sahni, "*The Use of Evidence Given in One Proceeding In Other Proceedings*" (Prepared for Symposium: Evidence Law for the Civil Litigator — 5th Annual Conference, 2008) and updated to reflect developments in the law on the deemed/implied undertaking.

[91] *Juman v. Doucette*, 2008 S.C.C. 8 at para. 25 [*Juman v. Doucette*]. Note: The Supreme Court confirmed that the implied undertaking exists in all Canadian provinces despite only being codified (in virtually identical language) in the civil procedure rules of Ontario, Manitoba, and Price Edward Island. In *Lac d'Amiante du Québec ltée c. 2858-0702*, [2001] 2 S.C.R. 743 [*Lac d'Amiante*], the Supreme Court recognized an equivalent civil law rule of confidentiality with respect to information disclosed during the discovery process. See also *Kitchenham v. AXA Insurance Canada*, (2008), 94 O.R. (3d) 276 (C.A.) [*Kitchenham v. AXA*]

[92] *Kitchenham v. AXA*, *supra* at para. 30.

[93] *Ibid.* at para 32; *Juman v. Doucette, supra* at paras. 23-28. See also *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 at 369 (C.A.) at p. 369.

[94] *Juman v. Doucette, supra* at para. 26.

justice outweighs any prejudice that would result to a party who disclosed the evidence". The courts' discretion to vary the implied undertaking rests on much the same balancing.

The Deemed Undertaking

Rule 30.1.01(1) states that the deemed undertaking only applies to evidence obtained under, or information obtained from evidence referred to in, one of the discovery processes in Rule 30 (documentary discovery), Rule 31 (examination for discovery), Rule 32 (inspection of property), Rule 33 (medical examination), and Rule 35 (examination for discovery by written questions) (collectively the "discovery procedures").

The deemed undertaking does not extend to procedures which are primary evidence taking procedures, such as affidavits, cross-examinations on affidavits, or examinations of witnesses on a pending motion.

Rule 30.1.01 limits only the *discovering* party and its lawyers' use of information obtained from the examinee. Despite earlier confusion on this front, the *discovered* parties cannot use the deemed or the implied undertaking as a "protective shield" to refuse to disclose evidence in one proceeding on the grounds that it disclosed the information in discovery for a separate proceeding. The party that discloses facts is not then bound or entitled to keep those facts confidential in the future by way of the deemed undertaking just because it revealed those facts in another proceeding. [95]

Exceptions to the Deemed Undertaking

There are four explicit exceptions to the deemed undertaking. The evidence, and information obtained from the evidence, may be used (i) if the producing party consents, (ii) if the evidence is filed with the court or is given/referred to during a hearing, (iii) to impeach the testimony of a witness in another proceeding, and (iv) if an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives and/or successors.[96]

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[95] For the deemed undertaking, see *Kitchenham v. AXA*, supra. For the implied undertaking, see *Tanner v. Clark* (2003), 63 O.R. (3d) 508 (C.A.) [*Tanner v. Clark*]; aff'g *Tanner v. Clark et al*. and *Reimer et al. v. Christmas*, (2002), 60 O.R. (3d) 304 (S.C.J.). The plaintiffs in two medical negligence actions were ordered to produce medical reports prepared in related arbitration proceedings before the accident benefits insurer. The medical reports were not protected by the deemed undertaking rule since they were not produced in the discovery process as described by the rules. The medical records were not subject to the deemed undertaking either because they were not *obtained* by the plaintiffs in the accident benefits proceeding, but rather *disclosed*. See also *Rogacki v. Beltz* (2003), 67 O.R. (3d) 330 (C.A.).

[96] Rule 30.1.01.

The Consent Exception

Rule 30.1.01(4) states that the undertaking does not prohibit a use to which the person who disclosed the evidence consents. Consent may be express or implied.[97] Also, the ability of a producing party to later withdraw consent is limited.[98] In the course of the same proceeding, the producing party may not be able to give consent for his or her own benefit and then withdraw consent at a later date to the detriment of an opposing party.[99]

The Open Court Exception

The Canadian judicial system is based on a presumption that all court proceedings must be conducted in an open and public manner so as to maintain confidence in the administration of justice.[100] This principle is enshrined both in statutory form and in the common law,[101] and has been built into the deemed undertaking rule. Rule 30.1.01(5) provides that the deemed undertaking does not apply to evidence, or information obtained from evidence, that is filed with the court or is given or referred to during a hearing. This is, perhaps, the most significant and contentious exception to the deemed undertaking rule.

The significance of this exception becomes apparent in the context of other rules relating to the use of the transcript of an examination for discovery. Rule 34.18(2) provides that where a party intends to refer to the transcript of an out-of-court examination on the hearing of a motion or application, a copy of the transcript for the use of the court *shall be filed in the court office* where the motion or application is to be heard. Similarly, Rule 37.10(5) provides that a party who intends to refer to a transcript of evidence at the hearing of a motion *shall file a copy of the transcript* as provided for by Rule 34.18.

The apparent effect of the *Rules* is that the protection afforded to a discovery transcript by the deemed undertaking is completely eliminated by the simple process of bringing a motion in respect of questions for which answers have been refused. The moving party may include the

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[97] *Csak v. Mokos*, [1998] O.J. No. 1594 (Div. Ct.) [*Csak v. Mokos*]; aff'g (1996), 23 R.F.L. (4th) 214 (Ont. Gen. Div.). The Court ultimately found that by alluding to the content of his pre-trial conference briefs in support of the main divorce action, Mr. Csak consented, by implication, to the defendant's use of the pre-trial conference briefs in a related defamation action.

[98] In *Temelini v. Canada Permanent Trust Co*. (2005), 21 C.P.C. (6th) 179 (Ont. Master) [*Temelini*], the document relied upon by the plaintiff had been obtained by him from the RCMP as a result of a third-party production order against the RCMP in another action by him. The document had originally been voluntarily obtained by the RCMP from Canada Permanent. Canada Permanent sought a dismissal of the second action based upon a breach of the deemed undertaking rule and the RCMP intervened to support that motion. Canada Permanent's motion was dismissed on the ground that it was not the party which had produced the document in the first action. The RCMP's motion was dismissed because the court determined that the interest of justice in letting the action continue outweighed the prejudice to the producing party. *Quaere*, since Canada Permanent had voluntarily produced the document to the RCMP in the first place whether Rule 30.1.01 applied at all.

[99] *Csak v. Mokos, supra*.

[100] *Hollinger Inc. v. Ravelston Corp*. (2006), 83 O.R. (3d) 258 (S.C.J.) [*Hollinger* (Ont. S.C.J.)]; rev'd on other grounds (2008), 89 O.R. (3d) 721 (C.A.), leave to appeal refused, [2008] S.C.C.A. No. 260.

[101] *Ibid*. See, *e.g*., the Ontario *Courts of Justice Act* (*e.g*., ss. 135, 137); *Toronto Star Newspapers Ltd. v. Ontario*, [2005] S.C.J. No. 41; *Vancouver Sun, Re*, [2004] 2 S.C.R. 332.

whole transcript even if only a few questions are in issue, because "a copy of the transcript" must be filed.[102] This is also the result on *ex parte* motions.[103] Cullity J. of the Superior Court of Justice noted:

> …it seems remarkable that the contents of an entire transcript may be removed from the ambit of the implied undertaking simply because it contains, for example, a single refusal that is subsequently challenged on a motion. If this is the effect of the rule in its present form, that rationale must be, I think, that as section 137(1) of the Courts of Justice Act provides, the public shall have access to "any document filed in a civil proceeding in a court", the contents of transcripts filed pursuant to rules 37.10(5) and 34.18(2) are ipso facto on the public record and within public knowledge.
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> *As I have indicated I see no escape from the plain meaning of the above rules … I am not particularly happy with this conclusion…*[104]

A court may direct the filing of only portions of the transcript where the issue raised in the does not require the filing of the full transcript. However, prior decisions have limited the circumstances in which such an order can be made.[105] Also, on consent of the other parties, a party may choose to file only a portion of the transcript to be referred to.[106] Where a party insists on filing the entire transcript, however, the *Rules* provide no express basis for the courts to interfere.[107]

In some instances, a party may wish to file the entire transcript in order to eliminate the deemed undertaking, *e.g.*, so that information from the transcript may be used more freely in other proceedings or to enable the public to have access to the information in the transcript.[108] Such an elimination of the deemed undertaking by an over-broad application of Rule 30.1.01(5) seems

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[102] *Lewis v. Cantertrot Investments Ltd*., 2007 CarswellOnt 7330 (S.C.J.) [*Lewis*].

[103] *Hollinger Inc. v. Ravelston Corp*. (2008), 89 O.R. (3d) 721 at para. 93 (C.A.) [*Hollinger* (Ont. C.A.)]. The Court of Appeal reasoned (at para. 97) that the open court principle would be slender if it did not apply to documents that have not been tested as to their authenticity or factual probity by the court. Furthermore, the court (at para. 99) pointed to the value in the public understanding and overseeing the exercise of the court's authority to issue *ex parte* Mareva injunctions freezing individuals' worldwide assets without notice to them.

[104] *Lewis, supra* at paras. 9, 10 [emphasis added].

[105] *Mirra v. Toronto Dominion Bank*, [2002] O.J. No. 1483 at para. 20 (Master).

[106] Rule 34.18(3).

[107] *Lewis, supra* note 15; *Moore v. Bertuzzi* (2007), 88 O.R. (3d) 519 (Master) [*Moore v. Bertuzzi*]. In *Moore v. Bertuzzi*, Master Dash found that where a court is faced with a situation where one party seeks to file a complete transcript and the other party seeks to file only relevant portions of the transcript (in order to keep them from public scrutiny), the court is bound to let the party file the complete transcript. However, the court is unlikely to award the costs of reproducing volumes of irrelevant transcript: *Rooftek Canada Inc. v. 614730 Ontario Inc*., [2007] O.J. No. 4385 (Ont. Master). See also *Moore v. Bertuzzi, ibid*.

[108] In *Lewis, supra*, class counsel wanted to post transcripts of the defendant's discovery on a website available to class members, but refused to limit public access to the site. The Court found that the *Rules* permitted such use because the materials had been filed on an earlier motion and the deemed undertaking no longer applied.

unjustified, and relief against that result by the application of Rules 1.04(1), 1.05 and 2.01 appears appropriate.

Accordingly, where the protection of the deemed undertaking will be lost, the examined party has little alternative other than to apply to the court for relief. That party may seek an order restricting the portion of the transcript to be filed. Also, an order might be sought sealing the transcript and ordering that the motion be heard in the absence of the public.[109] In the further alternative, the examined party might seek an order restricting the subsequent use of evidence obtained on discovery.

The Exception for Impeachment

Rule 31.1.01(6) permits a party to use evidence or information obtained from the discovery procedures to impeach or contradict the testimony of a witness in another proceeding.[110] However, the exception is limited in that the term 'proceeding' is defined in Rule 1.03 to mean an action or application.[111] Thus, evidence or information obtained from discovery procedures may only be used to impeach witnesses in the context of other court proceedings, and not administrative or criminal proceedings, except with leave of the court.[112]

In most circumstances where testimony continues to be protected by the deemed undertaking, only parties to and counsel from the prior proceedings should have access to the discovery transcripts.[113] In these circumstances, other persons will not know that the testimony could be useful for the purposes of impeachment.

The exception for impeachment does not appear to be limited to impeachment of the producing party. The wording in Rule 30.1.01(6) refers to the impeachment of 'a witness,' not "the witness" or "the producing party." However, the use of a transcript of one witness' examination to impeach another witness would be subject to the other rules of evidence.

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[109] Sections 135 and 137 of the *Courts of Justice Act*, R.S.O. 1990, c. C43

[110] See *Riley v. Tarantello* [2010] O.J. No. 1541 (S.C.): The defendant sought leave under Rule 30.1.01(6) to use a transcript from a previous discovery involving the plaintiff, who was involved in a previous car accident. The Court ordered (1) that plaintiff produce transcript (cost borne by defendant) and (2) that the transcript be used only for the impeachment of testimony and not any collateral purpose. See also *Anton Giovanni v. Phung*, [2001] O.J. No. 4659 (Master)

[111] *Tanner v. Clark, supra* note 8; *L.H. v. Caughell*, [1996] O.J. No. 3331 (Gen. Div.).

[112] In *L.H. v. Caughell, ibid*., it was held that leave of the court was required to use material disclosed in civil proceedings to impeach a witness in a professional disciplinary proceeding before the College of Physicians and Surgeons of Ontario because Rule 30.1.01(6) did not apply. See also *R. v. Nedelcu*, [2011] O.J. No. 795 (C.A.), leave to appeal granted [2011] S.C.C.A. No. 194, which holds that discovery transcripts cannot be used to impeach a witness's testimony in a criminal proceeding.

[113] The recent Supreme Court decision in *Juman v. Doucette, supra* has provided some insight into a debate that existed about whether counsel from the prior proceeding could reveal information to counsel in the subsequent proceeding on receipt of an undertaking that the information would be used solely for the purposes of impeachment. In the context of discussing whether non-parties can make an application to modify or vary the implied undertaking, the Supreme Court noted (at para. 53) that "if the undertaking is respected by the parties to it, then non-parties will be unlikely to possess enough information to make an application for variance in the first place that is other than a fishing expedition."

The Similar Action Exception

The undertaking does not prohibit the use of evidence or information in situations where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest.[114] As discussed below, a similarity between cases with respect to parties and/or issues is also a factor considered by the courts in determining whether or not to use their discretion to grant relief from the deemed/implied undertaking.

There is likely an "Immediate and Serious Danger" Exception

In *Juman v. Doucette*, the Supreme Court noted that the undertaking is imposed in recognition of the privacy interest of the witness and the public interest in the efficient conduct of civil litigation, but that those values are not absolute.[115] A strict reading of Rule 30.1.01 suggests that evidence or information to which the deemed undertaking applies cannot be used outside the proceedings in which the evidence or information was obtained, unless one of the four enumerated exceptions apply or a court orders otherwise. However, in reviewing the scope of the implied undertaking at common law, the Supreme Court reviewed the interaction of the implied undertaking and issues of public safety.

The Court drew an analogy with cases that have decided that solicitor-client privilege will yield to a "clear and imminent threat of serious bodily harm to an identifiable group … if this threat is made in such a manner that a sense of urgency is created."[116] Binnie J. reasoned that if a comparable situation arose in the context of an implied undertaking, the proper procedure would be for the concerned party to make an application to a chambers judge but, in a situation of "immediate and serious danger," the applicant would, in his opinion, be justified in going directly to the police without a court order. The "immediate and serious danger" exception is the law in jurisdictions that have not codified the implied undertaking. The burden may be very high to demonstrate why an application to a judge could not be made. It stands to reason that, subject to satisfying that burden, the urgent use of such information would also be legitimate in the jurisdictions that have codified the rule.

There is no "Crimes" Exception

In *Juman v. Doucette*, the Supreme Court rejected the "Crimes" exception accepted by the British Columbia Court of Appeal, finding that the public interest in the detection and prosecution of crimes does not outweigh the principles underlying the implied undertaking.[117]

Accordingly, parties and counsel are not permitted to report alleged criminal conduct to the police when disclosure of that conduct occurs during an examination for discovery, without leave of the court. In such an application were made, the court would weigh the privacy interest of the witness, the seriousness of the offence alleged, the "evidence" or admissions said to be revealed

[114] Rules 30.1.01(7), 31.11(8).
[115] *Supra* at para. 30.
[116] *Ibid*. at para. 40 quoting *Smith v. Jones*, [1999] 1 S.C.R. 455.
[117] *Ibid*. at paras. 42-50.

in the discovery process, the use to which the applicant or police may put this material, and any other relevant factors in determining whether to permit disclosure to the police.[118]

It has recently been held that the offence of perjury justifies relief from the deemed undertaking, on the basis of the public interest in insuring the truth of statements given under oath, rather than the state's interest in prosecuting a crime.[119]

The Undertaking is Subject to Legislative Override

The deemed and implied undertaking rules are subject to legislative override.[120] For example, in British Columbia, the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 provides that a person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.

Enforcement of the Deemed/Implied Undertaking

The Right to Enforce the Undertaking

The deemed undertaking rule is limited to and enforceable by only the examined or producing party. This is a direct reflection of the underlying principle that the rule is to protect against misuse by the discovering party, not to protect against all uses. The rule has developed to protect the privacy interests of the examined or producing party and his or her right to protection against self-incrimination and was not intended to protect third parties.[121]

Remedies for Breach of the Undertaking

The deemed/implied undertaking is an undertaking *to the court* not to use discovery evidence, or information obtained from discovery evidence, for purposes other than those of the proceeding in which the evidence was obtained. In serious cases, breaching the undertaking can result in contempt proceedings.[122] Less drastic but still significant remedies include a stay of

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[118] *Ibid*. at para. 44.

[119] See *Bowman v. Zibotics* [2010] O.J. No. 3393 (S.C.). A defendant in a civil case was relieved of the deemed undertaking in order to use transcripts from discovery in that case to lay a private charge of perjury against the plaintiff. The defendant was relieved under Rule 31.1.01(8), because the public interest in ensuring the truth of statements given under oath was sufficient to override the defendant's privacy interest. It is important to note that the court found that laying a private charge for perjury did not fit under the exception in 31.1.01(6) of impeaching a witness's testimony.

[120] *Juman v. Doucette, supra* at note 3, at para. 39.

[121] *Temelini, supra*. In *Temelini*, the plaintiff had obtained information revealed during the discovery of a non-party in an unrelated action. The non-party consented to use of the information by the plaintiff, who commenced a new action against the defendant. The defendant was not entitled to relief because the deemed undertaking is only enforceable by the producing party. See also *Ribeiro v. Bank of Nova Scotia*, [2002] O.J. No. 3597 (S.C.J.);
B.E. Chandler Co. Limited v. Mor-Flow Industries, Inc. et al. (1996), 30 O.R. (3d) 139 (Gen. Div.).

[122] *Orfus Realty v. D.G. Jewellery of Canada Ltd*. (1995), 24 O.R. (3d) 379 (C.A.) [*Orfus Realty*]; *Juman v. Doucette, supra* at note 3 at para. 29. In *Orfus Realty*, the Court also considered imposing a stay of

proceeding,[123] a dismissal of proceeding,[124] a striking of a pleading,[125] or a refusal to permit amendments.[126] Even in circumstances where the court ultimately granted relief from a deemed undertaking, the court has imposed cost sanctions for disregarding the undertaking before relief was granted.[127]

Applications for Relief from the Deemed/Implied Undertaking

Parties, Procedure and Burden

While only the examined or producing party may enforce the undertaking, any person with standing in a proceeding may apply to modify or vary the undertaking.[128] As noted above, it will be rare for non-parties to possess enough information to successfully apply to the court for relief from the undertaking; however, where a non-party engaged in other litigation with an examinee learns of potentially contradicting testimony given by the examinee in the discovery procedures of another proceeding, he or she would have standing to apply to the court for relief.[129]

It is important that motions for relief from the undertaking proceed expeditiously.[130] Also, the court to which that motion is made should be granted access to the documents or transcripts in issue for the purposes of making a determination about whether to grant relief.[131]

The Court's Discretion to Waive or Vary the Undertaking

The deemed undertaking is not absolute.[132] If one of the enumerated exceptions does not apply and there are no circumstances of "immediate and serious danger," a party may still apply to the court for an order relieving against the undertaking. The court has discretionary power to waive or vary the deemed/implied undertaking where it is satisfied that the interest of justice outweighs

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proceedings, but held (at para. 15) that there was not "any logical connection between the breach and plaintiff's action against the defendant so as to make the staying of this action a proper penalty."

[123] *Disher v. Kowal* (2001), 56 O.R. (3d) 329 (S.C.J.); *Kinsmen Club of Kingston v. Walker* (2004), 69 O.R. (3d) 453 (S.C.J.); additional reasons at 2004 CarswellOnt 974 (S.C.J.). In both *Disher* and *Kinsmen Club*, the Court permanently stayed actions which were initiated only as a result of information obtained in the discovery procedures of other proceedings and, hence, protected by the deemed undertaking rule.

[124] *Temelini, supra*.

[125] This remedy was mentioned in *Juman v. Doucette, supra* at para. 29.

[126] *London Life Insurance Co. v. Konney* (1998), 41 O.R. (3d) 706 (Div. Ct.); additional reasons 1998 CarswellOnt 4871 (Div. Ct.). While this decision was criticized by the Court of Appeal in *Kitchenham v. AXA Insurance Canada*, (2008), 94 O.R. (3d) 276 (C.A.), the case still serves to demonstrate that a refusal to permit amendments is a possible remedy for the breach of an undertaking.

[127] *Bowman v. Zibotics, supra* . See also, *Gleadow v. Nomura Canada Inc.* (1996), 44 C.P.C. (3d) 133 (Ont. Gen. Div.)

[128] *Juman v. Doucette, supra* at para. 53.

[129] *Ibid*.

[130] *Ibid*. at para. 31.

[131] *Lac d'Amiante, supra* note 91; *Juman v. Doucette, supra* at para. 30.

[132] *Dent Wizard International Corp. v. Sears* (1999), 45 O.R. (3d) 237 (S.C.J.).

any prejudice that would result to a party who disclosed evidence.[133] Dealing with the implied undertaking in *Juman v. Doucette*, Binnie J. noted:

> An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. … In other cases the mix of competing values may be different. *What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.*[134]

In *Kitchenham v. AXA*, the Doherty J.A. cited the above passage from *Juman v. Doucette* as reflecting the court's discretion under Rule 30.1.01(8) to grant relief from the deemed undertaking.[135] Doherty J.A. discussed the court's discretion in granting relief of the undertaking:

> Subrule (8) identifies the two competing interests which must be considered on a motion under that subrule. On the one side stands the "interest of justice". On the other side stands "prejudice" to the "party who disclosed evidence". The former interest must "outweigh" the latter before the deemed undertaking will be held not to apply to the information in issue. In the context of subrule (8), the "interest of justice" refers to factors that favour permitting the subsequent use of the information. Where the motion arises in the context of a party who seeks to use the information in subsequent litigation, the more valuable the information to the just and accurate resolution of the subsequent litigation, the more the interest of justice will be served by permitting the use of that information.
>
> *The interests of the party who was compelled to disclose the information are the only interests that can justify maintaining the undertaking.*[136]

The party seeking relief from the deemed undertaking carries a heavy burden of persuasion, and relief is given only in exceptional cases.[137] Courts have granted relief from the undertaking for the purposes of alerting potential victims of an ongoing fraud.[138] Courts have also relieved a defendant of the deemed undertaking in order to use discovery transcripts to lay a private charge

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[133] *Rules, supra* note 2, r. 30.1.01(8); *Juman v. Doucette, supra* at para. 34.
[134] *Juman v. Doucette, ibid*. at para. 32 [emphasis added].
[135] *Kitchenham v. AXA, supra,* at para. 62.
[136] *Kitchenham v. AXA, supra,* at paras. 57-58 [emphasis added].
[137] See *Livent Inc. v. Drabinsky*, [2001] O.J. No. 918, 53 O.R. (3d) 126 (Ont. S.C.J.); *Eparchy of Saints Cyril and Mothodius of the Byzantine Rite in Canada v. Slovak Greek Orthdox Church Foundation*, [1996] O.J. No. 3372, 5 C.P.C. (4th) 229 (Ont. S.C.J.); *Givogue v. Burke (Trustee of)* [2010] O.J. No. 4020 (S.C.J.)
[138] *HSBC Bank of Canada v. Alishah*, [2008] O.J. No. 5391 (S.C. Commercial List)

of perjury against the plaintiff.[139] In that case, the court found that the public interest in ensuring the truth of statements given under oath was sufficient to override the plaintiff's privacy interest.[140] Additionally, courts have relieved a party of the implied undertaking as it pertains to the working papers of an accounting firm auditing public companies.[141]

The factors considered by the court in granting leave to use evidence from civil proceedings in related *Employment Standards Act* proceedings have included the identity of the parties and the issues involved in both proceedings.[142] In *Juman*, the Supreme Court has indicated that leave will generally be granted to use discovery evidence in other actions involving the same parties and the same or similar issues because the prejudice to the producing party is virtually non-existent.[143] Thus, it is likely that such use will be permitted even in circumstances that do not fall within the confines of the similar action exception contained in Rule 30.1.01(7).

The factors considered by the court in granting leave to use evidence from civil proceedings in subsequent disciplinary proceedings before the College of Physicians and Surgeons have included that there would be limited third party access, that the relevance of the materials was conceded, that there was a risk of inconsistent verdicts and that the consequences of adverse findings for the doctors were severe.[144]

The factors considered by the courts in refusing to grant relief from the deemed undertaking rule in situations where transcripts from civil discovery proceedings were sought to further possible or ongoing criminal investigations have included the right of a suspect to remain silent in the face of a police investigation and the right not to be compelled to incriminate oneself.[145] The public interest in investigating possible crimes has not been held to be sufficient to

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[139] *Bowman v. Zibotics, supra*.
[140] *Ibid*. The court found that laying a private charge for perjury did not fit under the exception in Rule 31.1.01(6) of impeaching a witness's testimony.
[141] *Ontario (Securities Commission) v. Norshield Asset Management (Canada) Ltd.*, [2010] O.J. No. 637 (S.C. Commercial List) at paras 28-29. Campbell J. distinguished between the disclosing party's relative privacy interests in working papers and transcripts of examinations for discovery: "In this day and age of corporate governance and regulatory oversight, I question whether the auditors of a public company could have an expectation of exclusive privacy associated with their working papers. On the other hand, it would be reasonable for the auditors to expect that transcripts of their examinations would be disseminated to others only in the most extraordinary circumstances."
[142] *Leach v. Assaly* (1998), 28 C.P.C. (4th) 239 (Ont. Master); *Gleadow v. Nomura Canada Inc*. (1996), 44 C.P.C. (3d) 133 (Ont. Gen. Div.).
[143] *Juman v. Doucette, supra* at para. 35. See also *Lac Minerals Ltd. v. New Cinch Uranium Ltd.*, (1985), 50 O.R. (2d) 260 (Ont. H.C.J.)
[144] *K. (S.) v. Lee* (2000), 2 C.P.C. (5th) 325 (S.C.J.); *Browne v. McNeilly* (1999), 41 C.P.C. (4th) 330 (Ont. Gen. Div.), aff'd [2000] O.J. No. 1805 (C.A.). See F. Paul Morrison and Erica J. Baron, McCarthy Tétrault LLP, "Cross-Pollination in Parallel Proceedings: A Delicate Balance" (Advocates Society / American College of Trial Lawyers Spring Symposium 2005: "Excellence in Advocacy", 2005).
[145] *Juman v. Doucette, supra*; *755568 Ontario Ltd. v. Linchris Homes Ltd*. (1990), 1 O.R. (3d) 649 (Gen. Div.) [*Linchris Homes*]; *R. v. Nedelcu*, [2011] O.J. No. 795 (C.A.), leave to appeal granted [2011] S.C.C.A. No. 194.

counterbalance the important objectives of the deemed undertaking rule to ensure full and complete disclosure and to maintain confidentiality in a private process.[146]

The court will also consider the motives of the parties when determining whether to relieve against the undertaking. For example, the court has refused to vary the undertaking where a reasonable inference could be drawn that the plaintiff hoped that police would use the discovery evidence to find additional information which would assist its case or that the fear of a criminal investigation would force the defendants to settle the action.[147]

The costs of an independent review by a public regulatory body, and the fact that those costs might be obviated or lessened if discovery evidence were made available to that body, do not provide a sufficient basis to waive or vary the undertaking. Accordingly, a waiver or variation of the undertaking to permit the delivery to a regulatory body of documents or information disclosed during the discovery process in civil litigation should only occur in exceptional circumstances.[148]

Residual Application of the Implied Undertaking in Ontario

While the deemed undertaking rule serves to provide some certainty with respect to the appropriate uses of discovery evidence, the implied undertaking at common law may apply in circumstances not governed by the rule.[149]

Expert Reports

For instance, Rule 30.1.01(3) says that the deemed undertaking rule applies to "all parties and their lawyers" whereas the common law implied undertaking also encompasses third parties.[150] Thus, it has been held that experts who have obtained documents and/or information through discovery procedures are bound by the undertaking.[151] However, the expert reports themselves

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[146] *Linchris Homes*, *ibid*. In determining whether to exercise its discretion in those circumstances, the Court will weigh the factors referred to in *Juman v. Doucette*, at para. 32.
[147] *Ibid*. See also *Perrin v. Beninger et al*., 2004 CarswellOnt 2310 (Master) [*Perrin v. Beninger*].
[148] *Eparchy of Saints Cyril and Methodius of Slovaks of the Byzantine Rite in Canada v. Slovak Greek Catholic Church Foundation*, *supra* at note 55. Trafford J. noted, at para. 4: "The cost of the review … is not in itself a circumstance that will invariably lead to the relief sought by the moving party. The enabling legislation for most governmental agencies has limitations on their regulatory powers aimed at preserving the dignity and worth of individuals in a free and democratic society. They must not be attenuated by proceedings of this nature in the absence of clear and convincing evidence establishing compelling reasons to do so."
[149] See Richard B. Swan and Lisa M. Millman, Bennett Jones LLP, "Protecting Sensitive Documents and Evidence of Discovery: How Far Does the Deemed/Implied Undertaking Go?" (Paper presented at the Advocates Society Spring Symposium 2008: Trials and Tribulations: The Practical Advocate, 2008).
[150] *St. Elizabeth Society v. Hamilton (City)*, [2004] O.J. No. 1420 (S.C.J.).
[151] *Ibid*.; *Winkler v. Lehndroff Management* (1998), 28 C.P.C. (4th) 323 (Ont. Gen. Div.).

are typically considered to have been provided on a voluntary basis and, thus, are not protected by the implied undertaking.[152]

Expansion of the Rule

The courts will not permit an expansion of the common law implied undertaking that does not reflect the principles behind the rule.[153] For example, the Ontario Court of Appeal upheld the lower court's decision to refuse to allow the plaintiff to rely on the implied undertaking as a "protective shield" because the principle behind the rule is directed to prohibiting use by the recipient of the information, not to protect the information from all uses.[154]

Application to Regulatory or Arbitration Proceedings

The implied undertaking may apply to regulatory and arbitration proceedings outside of the discovery processes under the *Rules*. With respect to the primary rationale behind the implied undertaking, the Supreme Court noted in *Juman* that though the public interest prevails over the privacy interests of litigants, the "answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone."[155]

The compulsion of testimony and documentary production is not limited to the discovery procedures of civil proceedings. The rationale espoused by the Supreme Court and the Court of Appeal for the common law implied undertaking is equally applicable in other circumstances whereby documentary production and/or the giving of testimony is compelled by statutory instruments.

In upholding the conclusion that the *deemed* undertaking rule in rule 30.1.01 does not apply to arbitration proceedings, the Court of Appeal in *Tanner v. Clark* acknowledged that the common law *implied* undertaking may have such application if a party to those proceedings is compelled to give evidence or produce documents.[156] This acknowledgement suggests the potential for an expansion of the undertaking to other proceedings in which evidence is compelled by statute. However, the application of the implied undertaking in the context of regulatory proceedings has not been well developed in the case law, nor has the relationship of that principle to the Charter protection against self incrimination. The implied undertaking has been found to apply to administrative tribunals as well as courts in the context of an Ontario Securities Commission

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[152] *T1T2 Partnership v. Canada (Attorney General)* (1996), 48 C.P.C. (3d) 84 (Ont. Gen. Div.). Note: In *Perrin v. Beninger, supra*, the court recognized a distinction between a situation in which a party wishes to disclose the opposing party's expert report (voluntarily produced) and a situation in which a party wishes to disclose a report that is adverse in interest to the very party who was compelled by the rules to produce the documents and information on which the report was based.

[153] *Tanner v. Clark, supra*.

[154] *Ibid*. at para. 3.

[155] Binnie J. in *Juman v. Doucette, supra* at para. 25; see also: Morden A.C.J.O. in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 at 369 (C.A.)

[156] *Tanner v. Clark, supra* at para. 3.

proceeding under the *Securities Act*.[157] However, the real question in each instance is whether the evidence has been compelled in, and therefore whether the deemed undertaking applies to, any given regulatory or administrative proceedings.[158]

Use of Disclosure from Criminal Trial in Civil Proceeding

In criminal trials, the accused is entitled to disclosure of all potentially relevant material that the Crown has collected while investigating the alleged crime, otherwise known as the Crown brief.[159] The law with respect to disclosure of the Crown brief in a parallel civil proceeding was clarified by the Court of Appeal in *P. (D.) v. Wagg*.[160]

A party in possession or control of a Crown brief must disclose its existence in the party's affidavit of documents and must describe the nature of its contents in general terms. However, the materials making up the Crown brief are subject to a screening process, whereby consultation with the Attorney General and the police takes place prior to production. The rationale for the screening process is to ensure that any public interest concerns, such as the need to protect legitimate privacy concerns or the integrity of the criminal investigation process, are appropriately weighed against the public interest consideration in favour of full production and discovery.[161]

Actual production of the documents in the Crown brief will only occur where (a) all parties (including the Crown and the police) consent or (b) a court orders production of some or all of the documents contained therein.

The Court of Appeal considered the existence and the application of an implied undertaking rule with respect to disclosure of materials to the defence in a criminal case.[162] Though ultimately determining that it was not necessary to decide whether such an undertaking existed, the Court noted that there were compelling reasons for recognizing such a rule:

> There are important policy reasons for recognizing an implied undertaking rule with respect to disclosure of materials to the defence in a criminal case. The disclosure is compulsory and required because of the public interest in ensuring that the accused obtains a fair trial of the criminal charges. However, as a result of the criminal disclosure process, individuals, including innocent third parties,

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[157] R.S.O. 1990, Chapter S.5. See *A Co. v. Naster* [2001] O.J. No. 4997, 143 O.A.C. 356 (S.C.) at para. 24.
[158] See *Insight Venture v. Ernst & Young* [2008] O.J. No. 5572 (Master)
[159] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
[160] In *P. (D.) v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.) [*Wagg*], a doctor was charged with the sexual assault of a patient. Statements given by the doctor to the police during the investigation were excluded at trial on the ground that the police had violated the doctor's right to counsel. The criminal proceedings were eventually stayed on procedural grounds. In the civil proceeding, the complainant sought production of the contents of the Crown Brief, including the doctor's statements to the police.
[161] *P. (D.) v. Wagg*, 61 O.R. (3d) 746 at 747 (S.C.J.); rev'd in part on other grounds (2004), 71 O.R. (3d) 229 (C.A.).
[162] *Wagg, supra* at paras. 46-47.

> may find that highly personal information is made available to the accused. These individuals must … accept this intrusion in the interests of achieving a proper result in the criminal case, but the law should provide them with some reasonable protection against use of the information for entirely different purposes. …[163]

This judgment of the Court of Appeal again paves the way for an expansion of the common law implied undertaking.[164]

Conclusion

Parties and their lawyers may have to "think outside the box" if they want to obtain all the relevant and admissible evidence relevant to their case. This proposition is becoming truer as the world gets smaller, proceedings multiply and the amount of electronic recordings and transmissions rapidly grows.

In this paper, we have considered three kinds of evidence which are outside the normal types of evidence that is called in a civil proceeding: the evidence of witnesses outside Ontario; discovery evidence from non-parties; and evidence from other proceedings. Each of those kinds of evidence may impact upon other rules of evidence, but in this paper we have discussed how that evidence can be obtained and how it can be entered into or used in evidence, subject to those other rules.

We have seen some common threads in these three kinds of evidence. The first thread is captured by the "best evidence rule". Courts are concerned whether this kind of evidence is needed or appropriate, having regard to the other witnesses or evidence which can be brought before the court in a timelier and less expensive manner, and which can be seen and heard by the court,

The second thread is the issue of fairness. Is it fair to use against a person in one proceeding the testimony of that person in another proceeding? Is it contrary to privacy concerns? Is it contrary to the prohibition against self-incrimination?

The third element is the actual wording of the Rules. The Rules were drafted long ago, before the world of electronic commerce exploded. Are they still appropriate? Can the principles found in the Rules be adapted to similar situations, or should they only be applied to those specific rules?

While the electronic world is expanding exponentially, the courts have not yet answered all these questions. That is why we have raised them for review.

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[163] *Ibid*. at para. 46.

[164] Lower courts have recognized that there might be an implied undertaking in such circumstances. See *Ontario (Attorney General) v. Holly Big Canoe* (2006), 80 O.R. (3d) 761 (S.C.J. Div. Ct.).